United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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74-2373

To be argued by
JOSEPH W. RYAN, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2373

UNITED STATES OF AMERICA,

Appellee,

—against—

ELMER E. HORNBERGER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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UNITED STATES COURT OF APPEALS
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2373

UNITED STATES OF AMERICA,

Appellee,

—against—

ELMER E. HORNBERGER,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant Elmer E. Hornberger appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Jacob Mishler, *Ch. J.*) entered on September 13, 1974, following a six-day jury trial. Appellant had been found guilty of eight counts of a ten-count indictment charging that he had engaged in an income tax evasion scheme during the years 1967 and 1968, in violation of 26 U.S.C. §§ 7201 and 7206(1). Appellant, a self-employed builder of residential homes, had conducted his business under the following corporations of which he was President and sole stockholder: Story Book Manor, Inc. ("Manor"); Dotal Building Corp. ("Dotal"); Horn Enterprises, Inc. ("Horn"); Story Book Homes, Inc. ("Homes"). The jury found appellant guilty of the following offenses:

Counts One and Two: Appellant wilfully and knowingly attempted to evade and defeat payment of personal income tax in the sum of $19,334.27 for 1967 and $66,110.37 for 1968 (26 U.S.C. 7201).

Counts Three and Four: Appellant, as President of Manor, wilfully and knowingly attempted to evade and defeat payment of the corporation's income tax in the sum of $2,473.09 for 1967 and $12,960.90 for 1968 (26 U.S.C. 7201).

Count Six: Appellant, as President of Dotal, wilfully and knowingly attempted to evade and defeat payment of the corporation's income tax in the sum of $3,441.71 for 1968 (26 U.S.C. 7201).

Count Seven: Appellant, as President of Horn, wilfully and knowingly attempted to evade and defeat payment of the corporation's income tax in the sum of $3,393.72 for 1967 (26 U.S.C. 7201).

Counts Nine and Ten: Appellant, as President of Homes, wilfully and knowingly made, subscribed and filed false Small Business Corporation Income Tax Returns, knowing that the returns falsely understated the corporation's taxable income by the amount of $10,700.50 for 1967 and $61,209.69 for 1968 (26 U.S.C. 7206[1]).

Counts Five and Eight were dismissed at the close of the Government's case. Count Five was dismissed for failure of proof; and Count Eight was dismissed upon the ground that, as a matter of law, the amount of tax alleged to have been evaded was insubstantial (736a).*

On each count, appellant was sentenced to one year and a day imprisonment to be served concurrently. Appellant remains free on bail pending this appeal.

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* Page numbers in parenthesis refer to pages in Appellant's Appendix.

Statement of the Case

A. The Government's Case

The Government's case against appellant rested upon the testimony of appellant's accountant (Thomas Canale), the accountant's bookkeeper (Gertrude Paterno), appellant's former employees (Charlotte Waugh, Victoria Coletti and Rita Perrini), and a sampling of buyers of homes built by appellant (John Walshe, Richard Rizzi, Stephen Kmetz and William Campbell). In addition to their testimony, over 140 documents consisting of checks, correspondence and contracts were received into evidence in an effort to show that during 1967 and 1968 appellant had engaged in a calculated and deliberate tax evasion scheme whereby he evaded taxes on approximately $156,000 of income he had received from 93 home buyers. Each one of the 93 transactions was fully documented to show appellant's receipt of the income monies (Exhs. 14-107).

The $156,000 was not recorded as income in the appellant's corporate books and records, nor included on any of the corporate or personal income tax returns. The evidence [illegible] that appellant had devised the tax evasion scheme [illegible]ring buyers to make payments to him personal[illegible] not to his corporations for the "extra" work and supplies provided on each sale. By this device, none of the payments for "extras" were recorded in the corporate books and records as income, nor subsequently on the corporate or personal income tax returns.

To understand the evidence of the tax evasion scheme, however, it is necessary to state the nature of the "extra" payments, the established procedure maintained by appellant for the recording of income, and the manner in which appellant circumvented the procedure to conceal the $156,000 in income.

Appellant built homes on large tracts of land in Suffolk County, Long Island, as part of over-all "developments".

The standard contract for each sale provided that, for a fixed price, appellant's corporation would build a house similar to the model house shown at the development site. Any "extra" items, such as additional land, painting, insulation and the like, were provided for at additional cost in either the contract of sale, or in subsequent correspondence with the buyers (125a-26a, 178a-79a).

Prior to 1967, all payments for "extras" were made to appellant's corporations and deposited into the corporate bank accounts. Before depositing monies into the corporate bank accounts, appellant's bookkeeper (Victoria Coletti) would make appropriate entries identifying the source of the monies and the job number in the corporate checkbooks. The checkbooks and the bank statements were then routinely reviewed by appellant's accountant, Thomas Canale, and his bookkeeper, Gertrude Paterno. The deposit entries in the checkbooks constituted the sole source of information used to determine appellant's income. Appellant had been fully aware of this procedure for recording income, according to appellant's bookkeeper and his accountant. Therefore, under the foregoing procedure, appellant's income could only be ascertained if all payments were deposited and properly identified in the corporate bank accounts (126a-30a, 233a-34a, 298a-99a).

In January 1967, appellant began to instruct buyers to make checks payable to appellant personally (and not to his corporations) in payment for extras. None of appellant's employees, nor buyers was given any reason for this change; nor was appellant's accountant advised of the change (169a, 195a, 761a).*

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* There was evidence that appellant was vehement in his demand that checks for extras be made payable to him personally, and evasive when pressed for a reason for these requests. Buyer Richard Rizzi testified that appellant "bawled" him out when Rizzi made a $1500 check for extras payable to appellant's corporation and not to appellant. Appellant gave no reason for his request (77a-79a). Buyer John Walshe's attorney, Benjamin Greshin,

[Footnote continued on following page]

The checks for extras were usually received by appellant in the mail prior to the closings. According to the testimony of appellant's employees, it was appellant who would routinely open the mail at the office and receive the "extra" checks (130a, 183a, 211a, 226a-27a). During the years 1967 and 1968, the checks for extras aggregated approximately $156,000 and were deposited by appellant into three separate personal bank accounts. Neither appellant's bookkeeper (Coletti) nor his accountant (Canale) was aware of the fact that appellant had deposited the $156,000 into his personal bank accounts during 1967 and 1968 (170a, 300a).

Appellant's bookkeeper, Victoria Coletti, testified that at the end of each week she would give appellant an accounting of the outstanding bills that would have to be paid and the balance on hand in the corporate bank accounts. On several occasions, she advised appellant that cash was needed to meet outstanding bills.* Appellant would then issue a personal check to his corporation that needed funds. The checks were drawn on the personal bank accounts where appellant had deposited the payments for "extras". According to Coletti, appellant had instructed her to enter these funds in the corporate checkbook as personal loans or advances from appellant by making the

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pressed three times at the closing for the reason appellant had requested that a $1,913 check for extras be made payable to appellant when the contract stated that the corporation had agreed to provide the extras. Appellant and his attorney, Mr. Wolfsont, replied "Don't worry about it, never mind, it won't do any harm . . . get on with it." Greshin later wrote to the Internal Revenue Service concerning his suspicions that appellant was engaged in a tax evasion scheme. The Internal Revenue Service then instituted the investigation leading to the indictment herein (60a-64a, 68a-69a).

* Appellant's corporations had borne the cost of providing the "extras", and as much as $24,000 per year for appellant's personal expenses. Among other items, appellant used the corporate bank accounts to pay for the private schooling of his children, his country club, and health insurance (136a, 293a-97a, 206-07a).

corresponding entry "EEH" or "EEH advance" with each deposit. It was under these circumstances that thirty-seven deposits were made into the corporate bank accounts during 1967 and 1968, ranging from $100 to $14,000 from appellant's personal bank accounts (131a-34a, 467a-70a).

Under established procedure, the checkbook stubs were later reviewed by Gertrude Paterno, the bookkeeper for appellant's accountant. Those deposit entries marked "EEH" or "EEH advance" were automatically posted as stockholder advances in the corporate ledger and not as income (243a-45a, 270a-71a, 305a).*

Thus, by having diverted the payments for extras to his personal bank accounts, and thereafter causing false "advance" entries to be entered into the corporate checkbooks, appellant was able to conceal from his accountant the $156,000 income received for "extras". Had the $156,000 been deposited into the corporate bank accounts and properly identified it would have not only increased the corporations' income tax, but also appellant's personal income tax since, as the corporations' sole stockholder, appellant had treated the monies as his own personal funds. See *DiZenzo* v. *C.I.R.*, 348 F.2d 122 (2d Cir. 1965); *O'Rourke* v. *United States*, 347 F.2d 124 (9th Cir. 1965).

There was additional evidence offered against appellant concerning his conduct during the investigation. As proof of appellant's consciousness of guilt, the Government

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* The checkbook stubs containing the crucial entries "EEH" and "EEH advance" were not available for the trial. According to appellant, they were destroyed in a flood. The flood occurred during the initial stages of the Internal Revenue Service investigation in the basement of a building owned by appellant, after appellant had been advised to preserve the records for the investigation. Appellant knowingly discarded the "waterlogged" checkbooks into the garbage without advising IRS of the flood. Nor did appellant consult his attorney-accountant, Thomas Canale, before discarding the checkbooks. (846a, 956a-98a, 967a-68a).

offered evidence that during the IRS investigation appellant had given a false explanation as to the source of the "advance" or "loan" monies deposited into the corporate bank accounts. George Mazzella, the special agent in charge of the investigation, testified that when he had asked appellant for the source of each "advance" deposit, appellant explained that the monies were proceeds from a loan made by his mother. When asked where his mother had obtained the monies, appellant stated that she had inherited it from appellant's deceased father, who, in turn, inherited it from appellant's grandfather, a banker who died twenty years ago (472a-73a).

This explanation was refuted by the documentary evidence which showed that the source of the "advance" deposits were the "extra" payments maintained in appellant's personal bank account (Exhs. 108-111). In addition, appellant gave, on cross-examination, a bizarre explanation of the circumstances under which he had obtained the monies from his mother. The loan was allegedly made in cash. When asked to explain where he had obtained the cash, appellant testified that the monies were kept in a "tin box" located in the crawl space "very close to the plumbing" in the basement of his mother's home (821a-22a).

B. The Defense Case

Appellant took the stand in his own defense and testified that he was unaware of the fact that the $156,000 in extra payments were not properly entered in the corporate books, nor included in his corporate and personal income tax returns. He attributed his lack of knowledge to (a) his complete reliance up his accountant to prepare accurate income tax returns; (b) the misfeasance of his bookkeeper, Victoria Coletti, in recording the monies transferred to the corporate accounts as "advances" without appellant's knowledge or consent; and (c) his claim that he had been preoccupied with the operation of his business, and not with its fiscal affairs (744a-49a, 774a, 783a, 788a).

Appellant offered a reason for directing buyers to pay appellant personally for "extras". He testified that in early 1967 he had experienced "some difficulty" in trying to collect payments from buyers for "extras". Disputes arose over whether the extra work had been satisfactorily performed and buyers would stop payment on checks issued to appellant's corporations. In an effort "to stop these aggravating episodes at the closings", appellant testified, he thought that if payments were made to him personally buyers would be forced to sue only appellant and not his corporation over these disputes. This procedure, according to appellant, would "relieve the corporation of the responsibility" for the extra work in dispute and would preclude buyer lawsuits against his corporations, a consequence which appellant testified he had feared would adversely affect his credit rating in the business. This decision, according to appellant, was made of his own accord after conferring with several attorneys, but not his attorney-accountant for several years, Thomas Canale (764a-65a, 810a-19a).

Appellant also testified in sharp contrast to the testimony of his former employees on the critical issues in the case. Contrary to the testimony of Charlotte Waugh, Victoria Coletti and Rita Perrini, appellant testified that it was principally Charlotte Waugh and the other girls in the office who would open the mail, remove the checks for "extras", and deposit the "extra" checks into appellant's personal account (829a-34a). And contrary to the testimony of Victoria Coletti, appellant testified that he had told her that each deposit of monies from his personal account "represents extras", and that he had never instructed Coletti to enter the monies in the checkbooks as personal "advances" or "loans" to the corporations. Appellant offered no reason to explain why his bookkeeper had made the "advance" entries on her own accord (787-84a, 843a).

C. The Jury Deliberations

Following the Court's charge, the jury began its deliberations shortly after 4:00 P.M. At the initial stage of the deliberations, the jury requested and received over sixty contracts of sale, the "advance" checks, and various schedules relating to extras, advances, contracts and taxes. Three hours later, the jury requested and received a reading of the testimony given by the bookkeeper, Victoria Coletti, and appellant concerning the recording of "extras" in the corporate checkbook. The jury returned to deliberate. At 9:15 P.M., the jury finally returned and rendered its verdict of guilty on all the counts which had been submitted for its consideration (1138a-56a).

ARGUMENT

POINT I

The trial judge properly instructed the jury on the applicable law and appellant's theory of the case.

Appellant contends that he was "deprived . . . of a fair consideration of the evidence by the jury" because the trial judge refused to instruct the jury on the defense theory of the case, and improperly instructed the jury on the "knowledge" required to convict (Appellant's Brief, pp. 15-29 and 35-40).

These contentions are without merit for three principle reasons. First, the trial judge did, in fact, charge the jury on the defense theory of the case. Second, the trial judge was not required to give every contention made by the defendant, in support of the defense theory. And third, the trial judge properly charged the jury on the elements of "knowledge" and criminal intent.

The record shows that Judge Mishler did charge the jury on the defense theory of the case. The Court charged that "if the defendant had a good faith belief that the returns were correct when made and signed, then there is no criminal intent", and that the Government must prove beyond a reasonable doubt that appellant acted "with intent to deceive the Government, cheat the Government", and not as the result of "negligence, mistake or inadvertence in providing the information to his office help or his accountant in the preparation of his income tax return (1107a-08a). Twice during the charge the Judge gave a brief resume of appellant's testimony (1090a, 1108a):

> The defendant testified—I am just giving a brief resume of what he testified to concerning criminal intent—testified that he relied upon his accountant, Canale, to prepare accurate tax returns and was not aware that the monies withdrawn from his personal account and deposited to the corporate accounts were posted as advances or loans. He believed and understood that the corporations reported the extras as taxable income and that the corporations paid the taxes thereon.
>
> He testified he was under the impression that he paid a tax on the income charged to him as extras.
>
> * * * * *
>
> The defendant has testified that he was an extremely busy man, that he never examined the books of account of his corporations to determine how the payments made by him to the corporations were posted and never discussed the matters as to how extras were treated with his accountant, Mr. Canale; [and] that he never examined the income tax returns that he signed that might have made him aware that such payments were being treated as advances or loans.

Despite the foregoing, appellant contends that the trial judge did not charge the defense theory of the case. Appellant contends that the trial judge was also required to charge (a) the reason given by the appellant for directing extra payments to himself and not his corporation, (b) the appellant's "intention [to] return the funds to that corporation" and (c) the jury's duty to acquit if they accepted appellant's contentions and found that the "advance" entries were made in the corporate check books without appellant's knowledge or consent (Appellant's Brief, pp. 15-29, 35-40).

Although a court is required to state the defendant's theory of the case in its charge, when supported by evidence, it is not required to set forth every defense contention made in support of that theory, rehash the defense evidence, or emphasize the defense contentions. *Laughlin* v. *United States,* 385 F.2d 287, 294 (D.C. Cir. 1967), *aff'd on subsequent appeal,* 474 F.2d 444, 454-55 (D.C. Cir. 1972). Here the trial judge not only informed the jury that appellant could not be convicted if they found that the failure to report the $156,000 extra income was the result of inadvertence, negligence or mistake in handling his "accounts" or in providing information to his bookkeeper and accountant, but also gave a resume of the appellant's testimony which, if believed, would have required an acquittal. This charge, of course, followed appellant's summation where counsel argued at great length the contentions he asserts the trial judge was required to charge the jury (989a-92a, 996a-97a, 1002a-03a, 1009a-13a, 1021a-22a).

Appellant's real complaint is that, in the face of the "Government's evidence [which] was exceedingly strong, to say the least" (Appellant's Brief, p. 28), appellant should have received more help from the trial judge in advocating

his defense contention. This the trial judge properly refused to do when he told appellant's counsel (911a-13a):

> That again is nothing more than calling the jury's attention to the position of the defendant plus the imprimatur of the Court on giving it credence. . . . I did not say I would not give the position of the parties. That is a little different than summarizing the evidence and pointing to the defendant's position and the evidence supporting it.

Appellant further contends that he was "severely prejudiced" before the jury by the following charge (1109a):

> If the Government proves beyond a reasonable doubt that the defendant had a conscious purpose in avoiding knowing the contents of the books of account of the corporations, and the matters contained in his income tax returns, in other words, if he refused to examine them and look at them and did that knowingly and consciously, then you may infer from that fact and all the facts and circumstances in the case, if such is the reasonable inference based on common sense and experience, that the defendant knew that the monies deposited from his personal checking account to the corporation accounts were entered on the books of the corporations as advances in loans, and as such were not taxable as income either to himself or the corporations.

Appellant argues that because of his testimony that he had been unaware of the contents of the corporate records and tax returns records, "it was more than likely" that the jury construed his testimony to be an admission of guilt under the Court's "conscious avoidance" charge (Appellant's Brief, pp. 37-40).

This contention is without merit. First, appellant is unable to demonstrate that there is any basis for his speculation that the jury misconstrued his testimony as an admission of guilt in light of the court's charge. To the contrary, the record of the jury deliberations demonstrates that the jury fully recognized the purport of appellant's testimony. During the deliberations, the jury requested and received a reading of the sharply conflicting testimony between appellant and his bookkeeper, Victoria Coletti, concerning appellant's actual knowledge of the checkbook entries. Coletti's testimony, if believed, left no doubt that appellant had direct knowledge that the "extra" monies were being recorded in the corporate checkbook as "advances" and not income. Appellant's testimony, if believed, would have required acquittal since he testified that he was unaware that Coletti was recording the monies as "advances". By evaluating these conflicting versions the jury demonstrated that it had no confusion concerning the significance of appellant's testimony on the issue of knowledge and intent.

Secondly, the Court's charge was entirely appropriate to the issues in the case, particularly in view of appellant's complete denial of knowledge of the contents of either his corporate records or the corporate and personal tax returns. Where a defendant attempts to evade criminal responsibility by a disclaimer of knowledge of matters directly under his control, a jury should be instructed that if it is satisfied beyond a reasonable doubt that a defendant purposely avoided knowing the contents of such matters, it may infer guilty knowledge. The Court's charge has repeatedly been recognized and upheld in this Circuit. See *United States* v. *Frank,* 494 F.2d 145, 145-53 (2d Cir. 1974). *United States* v. *Joly,* 493 F.2d 672 (2d Cir. 1974); *United States* v. *Sacantos,* 455 F.2d 877 (2d Cir. 1972).

POINT II

The jury was properly instructed to disregard the opinions of the lawyers for buyers Richard Rizzi and John Walshe after their opinions had been improperly utilized by appellant's counsel in summation.

To understand appellant's contention, it is necessary to briefly set forth the relevant portion of the testimony given by Richard Rizzi, a buyer of a home built by the appellant. Rizzi testified that he had ordered "extras" from appellant which included additional land, painting, and insulation. Prior to the closing, Rizzi mailed appellant a $1500 check payable to Story Book Homes, Inc. for some of the extras. Appellant responded by a telephone call to Rizzi in which he "bawled out" Rizzi for not making the check payable to appellant. Rizzi apologized. Appellant gave no reason for his demand and returned the $1500 check to Rizzi. Before writing out another check, Rizzi consulted his attorney who advised him, according to Rizzi, that "it was perfectly all right to make the check out to appellant" (75a-80a).

In summation, appellant's counsel argued that appellant could not have been acting with criminal intent when he directed that "extra" checks be made out to him personally. Counsel then sought to undermine the in-court testimony of attorney Bernard Greshin (who represented buyer John Walshe) concerning Greshin's "puzzlement" at appellant's request that appellant be personally paid for the "extras". Counsel argued that Greshin's "puzzlement" at appellant's request for the "extras" payment was the product of unfounded and baseless suspicions. To bolster the argument, counsel pointed out that Rizzi's attorney had said that "it was perfectly all right" to make the check out to appellant (889a-90a):

> So Mr. Rizzi's lawyer didn't think there was anything wrong with making the check payable to Mr. Hornberger and not the corporation. Mr. Greshin, however, was puzzled.

By this argument, counsel sought to imply that weight should be given to the opinion of Rizzi's attorney in favor of appellant's conduct.

In charging the jury, the trial judge referred to the opinion of Rizzi's lawyer (1117a):

> His opinion is totally worthless. He is not here to be cross-examined as to his opinion and just disregard it entirely. That is only a matter between Mr. Rizzi and Mr. Rizzi's lawyer. It has nothing to do with this case at all. And the same thing with Mr. Greshin's puzzlement about why it was done and so forth.
>
> You will decide whether what Mr. Hornberger did was done knowingly and was a wilfull attempt to evade a substantial portion of the tax. And that is —I am referring to all the counts except 9 and 10.
>
> Mr. Rizzi's lawyer's opinion and Mr. Greshin's opinion are totally irrelevant to those issues.

Appellant argues that the foregoing instruction improperly "cut to ribbons" appellant's defense that he was acting in good faith when directing extra payments to himself. Appellant further contends that counsel's references to the opinion of Rizzi's lawyer "was based on evidence in the record; it was proper and relevant on the issue of appellant's intent, and its relevancy and materiality were scarcely a reason for the trial Court to tell the jury to disregard it" (Appellant's Brief, pp. 33-35).

The claim is frivolous. It is readily apparent that counsel's use of the opinion of Rizzi's lawyer can hardly

be considered within the scope of permissible argument. Apart from the hearsay nature of the opinion, it is patently clear that, if called as a witness, Rizzi's lawyer would not have been allowed to offer his opinion concerning the propriety of appellant's conduct. This was an ultimate fact to be determined by the jury. See *United States* v. *Hornstein*, 126 F.2d 217, 221 (7th Cir. 1949). Counsel's attempt to use the opinion given by an attorney who did not testify and who had no familiarity with the evidence of appellant's conduct overstepped legitimate argument on the evidence. The trial judge properly exercised his duty to control closing arguments by preventing counsel from misleading the jury on the appropriate weight and effect to be given to the opinion of Rizzi's lawyer. See *United States* v. *Sawyer*, 443 F.2d 712, 713-714 (D.C. Cir. 1971); *United States* v. *DeAngelis*, 490 F.2d 1004, 1010-12 (2d Cir. 1974).

Finally, appellant is unable to demonstrate how the Court's instructions "cut to ribbons" the defense contentions. It took the jury five hours to reach its verdict after careful consideration of the voluminous documentary evidence offered by the defense as well as the Government, and a reading of the conflicting testimony given by the appellant and his bookkeeper on the critical issues in the case. In addition, the record shows the judge also instructed the jury to disregard the testimony of Greshin's "puzzlement" which, if anything, would have favored the Government's case.

POINT III

The Government properly proved that there was a personal tax due and the Court properly ruled on the scope of cross-examination of Revenue Agent Vilardi.

The Government's case on Counts One and Two, charging that appellant willfully attempted to evade and defeat personal income taxes due on the "extras" was based upon constructive dividends in that appellant had diverted the monies to his own personal use.* Thus, appellant was not only required to report the "extra" monies as income to the respective corporations, but also as dividend income on his personal tax returns, since as sole stockholder he had treated the monies as his own personal funds. See *DiZenzo* v. *Commissioner of Internal Revenue*, 348 F.2d 122 (2d Cir. 1965); *O'Rourke* v. *United States*, 347 F.2d 124 (9th Cir. 1965); *Davis* v. *United States*, 226 F.2d 331 (6th Cir. 1955). To compute the additional personal income tax due, it was necessary to treat the "extra" monies as if they

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* Appellant's contentions in Point II of his brief, relating to the "constructive dividend", apply only to the convictions on Counts One and Two, and would not affect appellant's conviction on Counts Three, Four, Six, Seven, Nine and Ten. The Government's proof on the constructive dividend theory could only apply to the alleged evasion of appellant's personal income tax charged in Counts One and Two, as stated in the Government's pre-trial memorandum filed with the Court. Since appellant received sentences on Counts One and Two to run concurrent with the sentences imposed on the remaining six counts, there would be no reason to remand the case to the District Court should this Court conclude that reversal or dismissal is required on these two counts. The maximum sentence of 5 years could have been imposed on Counts Three, Four, Six and Seven; and a maximum of three years could have been imposed on Counts Nine and Ten. *United States* v. *Berlin*, 472 F.2d 1002, 1009 (2d Cir. 1973).

had been included in the various corporate tax returns as additional income. After applying the various deductions and taxes claimed on the corporate tax returns, it was then necessary to determine whether sufficient corporate earnings or profit remained from which a dividend could have been declared to appellant. See 26 U.S.C. § 316.* To the extent there were sufficient earnings and profits, the "extra" monies were treated as dividend income to appellant and the additional tax computed thereon.

To prove that appellant owed additional personal taxes, because of constructive dividends, the Government called Andrew Vilardi, an Internal Revenue Agent who had served in that capacity for over six years. Agent Vilardi was qualified as an expert witness who held a bachelor's degree in business administration, majoring in accounting, from Pace University. As a Revenue Agent, Vilardi had been required to compute tax deficiencies "a couple of hundred times" (632a).

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* Section 316(a)(1) and (2) of Title 26, United States Code, reads as follows:

§ 316. Dividend defined

(a) *General rule.*—For purposes of this subtitle, the term "dividend" means any distribution of property made by a corporation to its shareholders—

(1) out of its earnings and profits accumulated after February 28, 1913, or

(2) out of its earnings and profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

Except as otherwise provided in this subtitle, every distribution is made out of earnings and profits to the extent thereof, and from the most recently accumulated earnings and profits. To the extent that any distribution is, under any provision of this subchapter, treated as a distribution of property to which section 301 applies, such distribution shall be treated as a distribution of property for purposes of this subsection.

On direct examination, Agent Vilardi gave his opinion as to the additional taxes owed by appellant and the corporations based upon the $156,000 income from extras. The Government did not elicit the method or manner upon which Vilardi based his opinion. The basis for his computations were furnished to appellant prior to trial in both the Revenue Agent and Regional Counsel reports.* At the conclusion of Vilardi's direct examination, the Government offered into evidence schedules containing Vilardi's computations. Appellant objected without stating the ground and the Court reserved decision (633a-44a).

On cross-examination, appellant's counsel attacked the basis for Vilardi's computations. In response to counsel's questions, Vilardi testified that he did, in fact, take corporate earnings and profits into account in computing the constructive dividend income (657a).

During a luncheon recess, counsel for appellant objected to the schedules of Vilardi's computations and moved to strike Vilardi's testimony upon the ground that "there was an improper foundation laid for the figures" (658a-68a). Counsel argued, as he does on this appeal, that the Government did not affirmatively prove that the corporations had sufficient earnings and profits from which appel-

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* The Regional Counsel report showed that corporate earnings and profits were considered in determining the constructive dividend income to appellant. All of the "extras" monies were attributed to appellant as a corporate dividend except to the extent of approximately $4500 which was treated as a return of capital under the authority of *DiZenzo* v. *C.I.R.*, 348 F.2d 122 (2d Cir. 1965) because there remained insufficient profits or earnings from which to declare all the "extra" monies as a dividend income. In addition, the corporate tax returns showed that in each year the corporations had earned a profit and had accumulated retained earnings from preceding years with the exception of the Horn Corporation which showed a $104.82 loss for 1968, but nevertheless had on hand $4,348.08 retained earnings (669a-70a, Exhs. 5-12).

lant could be charged with a constructive dividend. Following extensive colloquy, Judge Mishler ruled that Vilardi's testimony and schedules were admissible because there was sufficient evidence from which the jury could infer, from the corporate tax returns which were in evidence, that the corporations had sufficient earnings and profits from which constructive dividends could be computed. Except for Horn in 1968, each corporation earned a profit and had accumulated retained earnings before any consideration of the additional $156,000 income from extras. To the extent the defense contested these facts, Judge Mishler ruled, appellant could cross-examine Vilardi and offer rebuttal evidence (657a-8_a; Exhs. 5-12).

Cross-examination of Vilardi continued. Not one further question was propounded by counsel for appellant concerning Vilardi's computation of constructive dividend income (682a-91a). Nor did appellant offer any rebuttal evidence. Indeed, counsel's summation was directed at the alleged failure of the Government to prove criminal intent, not taxes due. The defense argued in summation that the case should be civil and not criminal because "regardless of what your verdict . . . Mr. Hornberger is going to have to pay taxes. There isn't any question about that . . . he is going to have to pay taxes and he should and he will". The only issue, appellant argued, was whether he intended to cheat the Government of the taxes due (979a-80a, 1020a-23a).

On this appeal, appellant contends that the trial judge should have stricken Vilardi's testimony because the Government failed to prove that there were sufficient earnings and profits from which constructive dividends could have been declared under 26 U.S.C. § 316. This contention is without merit because, as the record demonstrates, Vilardi's testimony showed that the corporate earnings and profits were considered in computing constructive dividend income and was supported by the corporate tax returns which

showed that all but one corporation had realized profits during 1967 and 1968 and had accumulated retained earnings notwithstanding the "extras" income which had been omitted from the corporate returns.

For the purpose of determining whether the corporations had earnings and profits during 1967 and 1968, the corporate tax returns were reliable since they were prepared by appellant's accountant from the corporate books and records. Under these circumstances, it can hardly be argued that the Government failed to prove that appellant owed a substantial personal tax due upon the "extras" income based upon the constructive dividend theory.*

Appellant next contends the trial judge ruled as a matter of law, that (Appellant's Brief pp. 44-45):

> [I]t was not incumbent upon the Government to prove that these corporations (excluding Story Book Homes in Counts 9 and 10) had sufficient 'earnings and profits' in order to establish the existence of taxable income in a form of constructive dividend and substantial tax due and owing as charged in the indictment, but that the burden of proof was on appellant to show a lack of such corporate "earnings and profits".

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* At page 51 of his brief, appellant asserts that the taxable income was "inadequate on its face to cover the diversion of the 'extras' charged to appellant." In support of this contention appellant cites the amount of taxable income reported on the returns "as against" the amounts of the omitted extras. This is a mere play on numbers and wholly without substance because, as Agent Vilardi had testified, the amount of the omitted extras had to be *added* to the reported taxable income of each corporation in order to determine whether there were sufficient earnings or profits from which to declare dividend income (648a-49a).

Here again, the record belies appellant's contention. The trial judge ruled, after considering *DiZenzo* v. *C.I.R., supra,* that there was evidence from which the jury could conclude that there were sufficient corporate earnings and profits to declare a constructive dividend based upon the earnings shown in the corporate tax returns and Vilardi's testimony that corporate earnings and profits were considered in computing the constructive dividend (677a-78a, 1127a-28a).

Appellant next contends that the trial judge improperly restricted his cross-examination of Agent Vilardi which "sought to prove that [Vilardi] did not consider the 'earnings and profits' of the corporation in computing the additional income and tax charged as constructive dividend" (Appellant's Brief, pp. 45-46).

Contrary to appellant's representations, the record shows the trial judge did not restrict appellant from attacking Vilardi's computation of constructive dividend. The judge would not permit, however, appellant to conduct a cross-examination concerning Vilardi's construction and interpretation of the provisions of 26 U.S.C. § 316 because Vilardi was not qualified to render legal opinions (671a-78a, 685a-88a). This ruling was entirely proper since the witness was qualified only to give computations under the provisions of the Internal Revenue Code. It is understandable that appellant would, for tactical reasons before the jury, seek to demonstrate Agent Vilardi's lack of knowledge or expertise concerning construction and interpretation of 26 U.S.C. 316. But this could hardly be construed as preventing appellant from attacking the basis of Vilardi's computation. See *Huff* v. *United States,* 273 F.2d 56, 61 (5th Cir. 1959).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

January 3, 1975

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AFFIDAVIT OF MAILING

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COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 3rd day of January 1975 he served a copy of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Louis Bender, Esq.
225 Broadway
New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

3rd day of January 1975

Sylvia E. Morris

SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-[illegible]3861
Qualified in Kings County
Commission expires March 30, 1975